

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95,	)	WT Docket No. 10-112
And 101 To Establish Uniform License Renewal,	)	
Discontinuance of Operation, and Geographic	)	
Partitioning and Spectrum Disaggregation Rules	)	
And Policies for Certain Wireless Radio Services	)	
	)	
Imposition of a Freeze on the Filing of Competing	)	
Renewal Applications for Certain Wireless Radio	)	
Services and the Processing of Already-Filed	)	
Competing Renewal Applications	)	

To: The Commission

**Further Comments of NTCH, Inc.**

NTCH, Inc. ("NTCH") hereby submits these comments to refresh the record of a proceeding that went into suspended animation seven years ago. NTCH will focus on these specific concerns raised by the Commission's NPRM<sup>1</sup>: (1) the need to establish a safe harbor whereby geographic or population coverage will generally be deemed satisfactory to qualify as substantial service; (2) the need to afford licensees a reasonable amount of time (at least five years) to meet whatever substantial service benchmarks are ultimately adopted in this proceeding, (3), the adoption of a twelve month discontinuance of service period before a license is deemed forfeited and (4) opening a brief window for petitions to deny to be filed against

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<sup>1</sup> Amendment of Parts 1,22,24,27,74,80,90,95 and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services, Notice of Proposed Rulemaking and Order, 25 FCC Rcd 6996 (2010), ("NPRM")]

conditionally granted renewals where the facts would have justified not granting the renewal, conditionally or otherwise.

**1. A safe harbor for geographic and/or population coverage should be established.**

While the service-related renewal criteria proposed by the Commission at Para. 27 of the *NPRM* might be fine as metrics in assessing the provision of substantial service, those factors alone leave licensees in the dark as to how much service will be enough to warrant renewal. As matters now stand, licensees would have to guess at what level of service will be deemed sufficient, taking the risk that whatever level they themselves judged to be sufficient will fail to meet the FCC's unknown standard. Only as applications are filed and either granted or denied would licensees get a sense of where the line is drawn for satisfactory service. There is no reason to subject licensees to these potentially fatal risks since the Commission must itself have a sense of how much service will be adequate.

The Commission could and should provide some guidance as what coverage metrics for geography or population would likely meet with approval, subject of course to the application of the other non-coverage-based factors that are taken into consideration. The Commission should also make clear that coverage of area and population is the most important factor in assessing substantial service, with the other factors having lesser weight when the level of coverage is questionable or seemingly deficient. Coverage is, after all, an objective, easily verified fact that involves no qualitative or subjective judgments. At the same time, the Commission should explain how factors like investment, expansion, and types of facilities will affect the renewal equation, since the significance of these factors to substantial service is not readily apparent. Licensees cannot be expected to meet standards applicable for renewal when they don't know what those standards are.

**2. There must be a reasonable time to meet the standards that the Commission establishes**

When the NPRM in this Docket was issued in 2010, the Commission “recognize[d] the importance of resolving this proceeding in a prompt manner.” *NPRM* at Para. 113. Alas, despite the Commission’s best intentions, the proceeding remains unresolved seven years later. This delay has affected some of the timetables envisioned by the Commission in 2010. For one, AWS-1 licenses now come up for renewal in 2021, probably less than four years from when an Order in this proceeding will become effective. Many licensees in the Broadband Radio Service have licenses expiring in 2020. That seemed like a long way off in 2010 but now it is just around the corner. In 2010 the Commission thought that BTA-based BRS licensees would have five years from their substantial service deadlines till their renewals were due in 2016 to meet the standards set in this proceeding, and it deemed that five year lead time adequate. *NPRM* at Para. 32. By that same calculus, the Commission should ensure that all non-site-based licensees have at least five years to meet the new renewal criteria before their licenses expire. Any lesser amount of time, as the Commission recognized with respect to BRS BTA licensees, would not give them a fair amount of time to address the new criteria. It would plainly be unreasonable to impose new standards without allowing licensees adequate time to meet those standards, especially where there may be a need for significant new investment or installation of substantial numbers of new base stations to meet the standard.

A simple solution to this problem would be to extend the license terms of all licensees with imminent expiration dates to a date not less than five years from the effective date of the Report and Order in this proceeding. That would allow them adequate time to fairly address the new obligations associated with renewal.

**3. A license should not be deemed forfeited unless it has been out of service for not less than twelve months**

The *NPRM* proposes 180 days of non-service as the metric for automatic forfeiture of a license in all of the subject services. While NTCH endorses the concept of a uniform forfeiture-for-non-use rule across all spectrum bands, 180 days is too short. In this regard, we must first observe that Congress itself has established one year as the appropriate time period for revoking an unused license. See Section 312(g) of the Act. There is no reason why a shorter time period of inactivity should apply to broadcast stations as opposed to CMRS stations. If anything, since broadcast spectrum is much scarcer, the broadcast standard should be *more* stringent than the wireless one. The Commission should here be guided by the Congressional view of what constitutes an unacceptable period of non-operation.

From a practical standpoint, in NTCH's experience there are not infrequently situations in which service must be temporarily interrupted for significant periods of time. This may be caused by natural disasters, competitive circumstances, business downturns, poor market conditions, technology changes, and other factors that would cause a prudent businessperson to suspend his or her operations until the cause has been remedied. No businessperson wants a valuable spectrum asset to lie fallow any longer than absolutely necessary. By the same token, it is an undeniable economic distortion to compel a licensee to operate a station when there is no business case to justify it. The imposition of a summary forfeiture on a licensee who fails to operate for a relatively short period of 180 days is therefore not only unduly harsh and punitive, but flies against the Commission's fundamental tenet that auctioned licenses are in the hands of the people who will be economically driven to put them to their best and highest use. No one's interest is served by forcing licensees to operate stations solely to meet FCC obligations when there is no actual public need for the service.

That said, NTCH is sympathetic to the view that unused spectrum in the hands of one licensee might be handled differently by another. 180 days is certainly too short an inactive period to penalize licensees given the vagaries of weather and markets. If the Commission determines that artificial use obligations must be imposed, the allowable period of non-use should be at least twelve months, as the Congressionally set timetable would suggest. In addition, as also provided by Congress in Section 312(g), there should be a mechanism in the rules that permits a licensee to avoid automatic forfeiture by explaining extenuating circumstances that prevented it from being operational and setting forth a concrete plan for resumption of operations. As with Section 312(g), such a safety valve should be strictly applied to ensure that the non-operation was for reasons outside the licensee's control.

**4. The Commission should open a brief window for interested parties to challenge conditionally granted renewals based on facts that have become known while this Docket has been pending**

The *NPRM* established some unusual procedures for dealing with renewal applications that have been filed during the pendency of this Docket. At Para. 113, the Commission provided that such applications would be processed and conditionally granted so as to relieve any "uncertainty" that incumbent licensees might feel about having long pending renewal applications. While the Commission contemplated that any petitions to deny pertinent to such applications should be filed in the period contemplated by section 1.939 of the rules, that process would have been pointless over the last seven years since a prospective petitioner could not know how such a petition would be entertained or dealt with until this Docket was resolved. Indeed, a petitioner would not even know if it had standing to file such a petition pending the conclusion of the Docket since the effect of disqualifying the incumbent could not be known until this Docket is resolved. Since one possible outcome of this Docket is that a petitioner with

information that would disqualify a renewal applicant would be eligible to vie for the vacated license if its petition were to be granted, such a petitioner might only now have standing to present the information to the Commission for review.

Under these circumstances it would have made no sense for a potential petitioner to file a petition to deny before this Docket was concluded since it might have been subject to summary dismissal depending on the outcome of the Docket. Indeed, filing such a petition would have flown directly in the face of the stated intent of the Commission to prevent the filing of unnecessary pleadings or petitions while the outcome of the Docket was pending. See *NPRM* at Para. 102. (“We direct the Wireless Telecommunications Bureau to dismiss as unacceptable for filing any additional pleadings filed regarding any of the currently pending renewal applications or mutually exclusive applications.”)

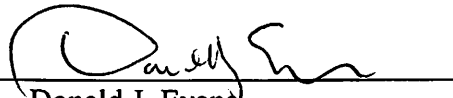
While forbidding the filing of unnecessary paperwork, the Commission also declared that it “must preserve any available legal rights of the applicants that have already filed competing renewal applications, as well as the legal rights of any party that might be interested in filing a competing renewal application absent the subject freeze.” *Id.* at Para. 101. In order to preserve the right of a potential applicant to challenge a renewal applicant’s basic qualifications and thus have a chance to acquire the subject license in an auction, the Commission must permit such a petitioner to present the information at the close of this Docket when it is finally appropriate to do so and when the entire renewal process has been finally established. Otherwise the Commission would have permanently abrogated the legal rights of parties interested in challenging the grant of a renewal application. The Communications Act makes it clear that

FCC licenses are not invested in any one licensee in perpetuity;<sup>2</sup> if a licensee is, under the rules ultimately adopted by the Commission in this Docket, not qualified to have its license renewed, then the Commission must allow potential challengers the opportunity now to make that showing. See, by analogy, *New South Media Corp. v. FCC*, 685 F. 2d 708, 716 (D.C. Cir. 1982), where the Court of Appeals held that the Commission could not preclude challengers from filing competing applications by freezing their opportunity to do so.

Because the number of licenses in this posture is likely to be very small, the Commission could satisfy its obligation by affording a brief window after the effective date of the Report and Order for petitioners to come forward and file. If no petitions are filed or if any petitions are dismissed or denied as without merit, the conditionally granted renewals could then become unconditional.

Respectfully submitted,

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<sup>2</sup> 47 U.S.C. Section 301.